IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:

RSA.No.236 of 2001.

Date of Decision :7th September, 2007.

Billu …Appellant.

Versus:

Himatu Ram. …Respondent.

Coram:
The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes.

For the appellant: Mr.Bhupinder Gupta, Sr.Advocate withMr.Neeraj Gupta, Advocate.

For Respondent. Mr.G.D.Verma, Sr.Advocate with Mr.B.C.Verma, Advocate.

Sanjay Karol, J .

In the present appeal, the appellant has assailed the judgment and decree dated 23rd April, 2001 passed by the District Judge, Rampur Bushahr in Civil Appeal No. 39 of 2000, reversing the judgment and decree dated 30th September, 2000 passed by Sub Judge, Ist Class in Civil Suit No. 53 of 1998 titled as Billu Vs. Himtu Ram and others.

The appellant herein is referred to as `defendant' and the respondent is referred to as the `plaintiff'. The appeal was admitted on the following substantial questions of law:

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

1. Whether presumption of truth is attached to the record of the rights prepared during the settlement operation under Section 32 of the Himachal Pradesh Land Revenue Act.?.

2. Whether the judgment of the learned lower appellate court is result of mis-appreciation, and mis-interpretation of the documentary evidence?.

The plaintiff filed a suit for possession of land comprising in Khata Khatauni No. 90/263 min, Khasra No. 288 measuring 0-13-55 situate in Up-Mohal Bharari, Tehsil Kumarsain, District Shimla on the premises that he is the owner in possession of the aforesaid land which fell into his share by way of family arrangement and since the plaintiff was working as a driver with the H.P.Public Works Department away from his home, taking advantage of his absence, defendant encroached upon the plaintiff's land. On 18th June, 1998, the land was demarcated when it was noticed that the defendant had encroached upon the plaintiff's land and at that time the defendant promised to vacate and deliver the possession after harvesting the crop sown by him, but however, he failed to do so. The ownership and possession of the plaintiff and proforma defendants was recorded by virtue of oral partition which was duly reflected in mutation No. 194 dated 15th June, 1987 (Ext.P-3) and Jamabandi Missal Hiquiat (Ext.PA).

The defendant resisted the said suit on the ground that plaintiff is neither owner nor in possession of land comprising Khasra No. 288 prior to the settlement operations carried out in the year 1980, as is evident from Jamabandis (revenue record) for the years 1979-80 (Ext.DA) and 1985-86 (Ext.DB), Khasra No.93 comprised of two kitas, namely, khasra No.93 min. measuring 1-15 bighas showing the

ownership and possession of plaintiff-Billu and Khasra No.93 min. measuring 3-9 bighas showing the ownership and possession of defendant-Himtu. Since there was no other land available in khasra No.93/3, therefore there was no question of any encroachment by any person on the land being Khasra No.93/3 (old) subsequently re-numbered as Khasra No.288. According to the defendant he is the owner in possession on the said land for more than 12 years where he has planted his orchard. The Court below framed the following issues based on the pleadings of the parties:

1. Whether the plaintiff is entitled for the relief of possession of suit land,as prayed for?. …OPP.
2. Whether the plaintiff has not valued the suit property? ….OPD.
3. Whether the suit is time barred? …OPD.
4. Whether the plaintiff is estopped by his act and conduct to file the present suit …OPD.
5. Whether plaintiff has no locus standi to file the present suit? …OPD.
6. Whether suit is not maintainable in the present form? …OPD.
7. Whether this court has no jurisdiction to try the present suit? …OPD.
8. Relief.

Issue No.1 was decided in favour of the plaintiff and issues No.2 to 7 were decided in the negative against the defendant.

In support of their case, the plaintiff got examined himself as PW-1 and exhibited copy of the Missal Hiquiat Bandobast Jadid

(Ext.PA), copy of the order passed by the Assistant Collector, Ist Grade, Kumarsain dated 19th August, 1996 (Ext.P-2) and copy of the mutation (Ext.P-3). The defendant examined himself as DW-1 and produced two more witnesses namely, Shri Durga Singh (DW-2) and Prem Dass (DW-3) and got exhibited copy of the Jamabandi for the year 1979-80 (Ext. DA) and Jamabandi for the year 1984-85 (Ext.DB). Based on the material on record, the trial Court decreed the suit of the plaintiff, as prayed for.

Aggrieved by the same, defendant filed an appeal which was decided by the District Judge, Kinnaur, who reversed the judgment and decree passed by the Court below. The factors which weighed with the First appellate Court in reversing the judgment are : (1) the appellant is an illiterate person (ii) since there was documentary evidence on record to show that Khasra No.93 comprised only of two parts i.e. khasra No.93 min. measuring 1-15 bighas and khasra No.93 min. measuring 3-9 bighas totaling 5-4 bighas, therefore new khasra No.93/3, which now stands re-numbered as khasra No.288 and is the subject matter of the suit, could not have been carved out and did not exist. (iii) the mutation did not confer any title, therefore, no reliance could be placed on Ext.P-3.

Learned counsel for the appellant has argued that Ext.P-3 is a document duly executed and exhibited in accordance with law and the defendant has failed to rebut the presumption in law. The judgment of the first appellate Court is erroneous and perverse for the reason that the factum of partition as also the order recording the oral partition between the parties and effecting the mutation recording the ownership and possession has not been assailed by the defendant.

Per contra, the learned senior counsel for the respondent has defended the impugned judgment for the reason recorded therein. He has vehemently argued that (i) the first appellate Court being the last Court recording a finding of fact, this Court should not interfere in the same.. He has referred to *Veerayee Ammal Vs. Seeni Ammal* AIR 2001 Supreme Court 2920, *Commissioner of central Excise, New Delhi Vs. Acorn Engg. Ltd.,* (2005) 10 Supreme Court Cases 553 and *Mercykutty Amma Vs. Kadavoor Sivadasan and another* AIR 2004 Supreme Court 342 to emphasis the scope of jurisdiction of this Court in Regular Second Appeal. (ii) plaintiff deliberately chose not to produce the Kanungo who had effected the partition and, therefore has concealed the best evidence as he could have stated the true state of affairs. (iii) even before this Court, the appellant has failed to show as to how Khasra No.93/3 (Old) renumbered as new Khasra No.288 was out of the original khasra No.93 carved out. (iv) From Ext.DA it is evident that the classification of the land is different from what is now reflected in the revenue record.

From Ext.P-3, it is clear that the total joint holding between all the share holders including the plaintiff and defendant is 25-11 bighas in which the defendant has ½ share, the plaintiff had 1/4th share and other co-owners jointly held the remaining share . The land comprising of 18 kitas was partitioned in the following manner.

1.Plaintiff (1/4th share)	Khasra No.93/2,93/3 and 634/2 measuring 5-10 bighas.
2.Defendant (1/2)share	Khasra No.199/2, 625, 229, 223, 634/1 and 211/ 2 measuring 7-14 bighas.

3.Other Co-sharers(remaining share)	Khasra No.138, 631,662, 691,689,696, 628 & 1060 measuring 12-7 bighas.

From the erstwhile khasra No.63/1, 2-6 bighas of land was acquired by the government. The order of the revenue officer records that all the parties were present and agreed for the partition as recorded. The entries were recorded with their consent to be true and correct. The land was demarcated and the possession of the respective portions handed over to the parties. Minor variations in the respective share holding was agreed to be ignored.

There is no dispute that the plaintiff had 1/4th share in un-divided land holding of 25-11 bighas, therefore, they have rightly received 5-10 bighas of land which is approximate to their share holding. Importantly the grievance of the defendant is not that his total entitlement in the entire share holding has been reduced or that he has got less land than what he was entitled to. It has come on record that 2-6 bighas of land comprising khasra No.93/1 was acquired by the Government for the construction of a road and the defendant has admitted having received 50% of the compensation.

Amar Nath (PW-1) has deposed that in 1987, the partition between the parties was duly recorded in the revenue record and mutation effected on 15th June, 1987. He has been working as a driver in the H.P. Public Works Department and was staying away from home and it was only in the year 1996 when he got the land demarcated on 18th June, 1996 when he learnt that defendant had encroached upon the plaintiff's land. The demarcation was carried out in the presence of the parties when the defendant agreed that he would handover the possession of the encroached land after harvesting the crop which he

had sown. He has exhibited P-1, copy of the jamabandi, demarcation report mark-`x' and the order passed by the Assistant Collector, Ist Grade (Ext.P-2.).

Himtu (DW-1) in his statement has admitted that mutation in terms of the partition was got effected and recorded by Patwari and the revenue record was prepared. He has admitted that the partition was got recorded on 15th June, 1987.He has, however stated that he is an illiterate person and therefore does not remember but has subsequently admitted that Kanungo had recorded his statement wherein he had stated that if his land exceeds 50% of his share holding, he would leave the excess land. He has admitted that he knew about the orders passed by the revenue officials and had not preferred any appeal and also not taken any steps for correction of the mutation record.

Durga Singh (DW-2) is the Patwari, who has stated that original khasra No.93 was comprising of 5-4 bighas of land and as per the original revenue record khasra No.93 was divided into two parts, 1-15 bighas of land in possession of the plaintiff and 3-9 bighas of land in possession of the defendant. He has however admitted that 1-13 bighas of land is in the ownership and possession of the plaintiff. He has further admitted that the road is constructed on khasra No.93/1. He has deposed that khasra No.93/2 and 93/3 (old numbers) had fallen to the share of the plaintiff and khasra No.288 is shown to be in the possession of plaintiff. He issued Exts. DB and DA pertaining to the year 1979-80 and 1985-86 respectively but has however admitted that he did not visit the site before issuing the document.

In view of the aforesaid statements of the parties, it is clear that the partition between the parties had taken place which was duly

recorded and reflected in terms of Ext.PA. The plaintiff undisputedly has not got more land than his share holding. It is not the complaint of the defendant that his share holding has gone down. None of the parties have deposed that the entries of mutation in terms of Ext.PA have been carried out in violation of the settled procedure. Importantly, the defendant does not dispute the ownership of the plaintiff on the suit land. Then where is need of the plaintiff to produce the Kanungo who prepared the revenue record evidencing the partition.

In my view the judgment of the first appellate Court is totally erroneous and perverse and based on conjectures and surmises. The finding of the court below that the plaintiff had manipulated the attestation of mutation of the suit land in his favour is without any basis and purely conjectural. Similarly, the finding that the field book of Khasra No.93 had not been prepared is also not borne out from record. It is nobody's case that the order dated 15th June, 1987 (Annexure:P-3) is bad in law for any reason. Reliance has been placed on Ext. DA and DB, to record that Khasra No.93 had only two parts and therefore based on the same the decree of the trial Court was reversed. What was, however, not considered by the appellate Court was the fact that the certain part of his land out of khasra No.93 was acquired for the construction of a road. It is clear from the statement of the DW-2 that the road was constructed on khasra No.93/1. It was in this background that a new khasra was carved out and khasra No.93 was divided into three parts and on the date of the partition, there was no khasra No.93/1 available with the parties for partition. In *Durga Singh Vs. Tholu and others*,AIR 1963 S.C. 361, where the Court was considering the

provisions of Punjab Tenancy Act as applicable to the State of Himachal Pradesh ,it has been held as under:

> " The learned judicial Commissioner has omitted to bear in mind the provisions of S. 44 of the Act which give a presumptive value to the entries in the revenue records. There are prior entries which are in conflict with those on which the learned District Judge has relied. It is sufficient to say that where there is such a conflict, it is the later entry which must prevail."

Therefore, the court erroneously set aside the finding of the trial Court wherein it was held that the entries made in Ext.PA were on the basis of Khangi partition recorded vide mutation Ext.P-3 and the plaintiff was entitled to a decree of possession of the suit land.

The finding of the trial court, in my view, is relevant and is reproduced as under:

> " The defendant further examined DW-2 Sh.Durga Singh, Patwari, Halqua who has deposed that according to the Jamabandi for the year 1979-80, khasra No.93 was bifurcated into 2 min khasra Nos. 93 min and 93 min and one 93 min is measuring 1-15 bighas which is in possession of the plaintiff and the other 93min measuring 3-9 bighas is in the possession of the defendant and out of this 3 bighas and 9 biswas, one bigha and 10 biswas was acquired in the road and the remaining portion is 1-13 bighas. As per new record, the suit land is measuring 0-13-55 hectares on which almond and apple trees are planted and are having age of 10-12 years. Further deposed that the new numbers are 287 and 288. Further admitted in his cross-examination that khasra Nos. 287, 288, 289, 364 and 365 were carved out of khasra Nos. 93/2 and 93/3 and khasra No. 288 is recorded in possession of the plaintiff Billu, which further strengthens

> the case of the plaintiff that the suit land has fallen in the share of the plaintiff."

The revenue entries recorded prior to 1987, therefore, would become irrelevant for the purpose of depicting the partition entry into between the parties.

The dispute in question today is governed by the provisions of the H.P. Land Revenue Act and Section 32 deals with the record of rights and documents and Section 45 raises a statutory presumption in favour of the entries in the record of rights and periodical records.

The learned senior counsel for the respondent has referred to *Commissioner of Central Excise, New Delhi Vs. Acorn Engg. Ltd*. (2005) 10 Supreme Court Cases 552 to contend that concurrent finding of fact should not be interfered with. The said decision was based on the finding of the court that the first appellate Court had neither ignored the material evidence on record nor considered any evidence which was otherwise not admissible. The judgment is not applicable in the facts of the present case for two reasons (i) the present case is a case of reversal (ii) the judgment of the first appellate Court has been held to be perverse and contradictory to the record and the same is in violation of the settled position of law.

In *Veerayee Ammal Vs. Seeni Ammal*, AIR 2001 Supreme Court 2920, again is a case where the Supreme Court was dealing with the concurrent finding of fact. While deciding the aforesaid case, the ratio of law laid down by the apex Court *in Sir Chunilal V Mehta & Sons Ltd. Vs. century Spinning & Manufacturing Co. Ltd*. AIR 1962 S.C. 1314

has been reiterated which in my view fully applies in the present case and is reproduced as under:

> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is a general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion or alternative views. It the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law".

The questions of law are answered accordingly.

For the aforesaid reasons, the appeal is allowed, and the judgment and decree dated 23rd April, 2001 of first appellate Court is set aside and that of the trial court is restored. There shall be no order as to costs.

(Sanjay Karol),
Judge.

September 7 , 2007(R)